

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1945

No. **128**

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LIBERTY MUTUAL INSURANCE COMPANY (a
corporation), and CONTRACTORS PACIFIC
NAVAL AIR BASES, an association,

Petitioners,

VS.

WARREN H. PILLSBURY, Deputy Commis-
sioner of the United States Employees'
Compensation Commission for the 13th
Compensation District and WALTER L.
WOOD,

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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The first of these is the fact that the United States is a young nation. It is only about 150 years old, and its history is therefore a very recent one. This is in contrast to the history of the European countries, which have been for centuries. The second fact is that the United States is a large country. It covers a vast area of land, and its population is very large. This is in contrast to the European countries, which are much smaller. The third fact is that the United States is a free country. It has a constitution which guarantees the rights of its citizens, and it has a government which is elected by the people. This is in contrast to the European countries, which have been for centuries.

The fourth fact is that the United States is a democratic country. It has a government which is elected by the people, and its citizens have the right to vote. This is in contrast to the European countries, which have been for centuries. The fifth fact is that the United States is a peaceful country. It has never been at war with any other country, and it has always been a friend to all nations. This is in contrast to the European countries, which have been for centuries.

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Compensation District and WALTER L.
WOOD,

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Supreme Court of the United States:

Your petitioners, Liberty Mutual Insurance Com-
pany, a corporation, and Contractors Pacific Naval

Air Bases, an association, respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered March 18, 1946 (rehearing denied April 23, 1946) in an action numbered and entitled on its docket No. 11,094, Liberty Mutual Insurance Company, a corporation, and Contractors Pacific Naval Air Bases, an association, Appellants, vs. Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District, and Walter L. Wood, Appellees, wherein the appeal was dismissed by the said Circuit Court because of alleged lack of jurisdiction.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This case came to the United States District Court for the Northern District of California, Southern Division, on an amended libel for mandatory injunction, filed May 12, 1944, and directed against Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th District, and Walter L. Wood. The libel was filed in accordance with the terms of Section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act of March 24, 1927, 44 Stats. 1424 (33 U.S.C.A., Section 901, et seq.), as made applicable to persons employed at certain defense base areas and other places by the Act of August 16, 1941, 55 Stats. 622. (42 U.S.C.A., Secs. 1651 to 1654.) (R. 9-22.)

On June 11, 1944, the United States Attorney at San Francisco, representing Deputy Commissioner Pillsbury, moved to dismiss the amended libel on the ground that said libel did not state a cause of action, did not entitle libelants to any relief, and, more particularly, "that it appears from the amended libel, including the transcripts of testimony taken before the deputy commissioner and made a part of the amended libel, that the findings of fact of the deputy commissioner in the corrected compensation order filed by him on April 15, 1944, complained of in the amended libel, are supported by evidence and under the law said findings of fact should be regarded as final and conclusive." (R. 23.)

Briefs were filed by both parties on the motion to dismiss, the matter was argued, and the motion was submitted. (R. 68.)

On December 26, 1944, the clerk of the District Court filed the following order:

"(Title of Court and Cause.)

"ORDER

It is ordered that the motion of respondent Warren H. Pillsbury, to dismiss the amended libel for mandatory injunction filed herein be and the same is hereby granted and said amended libel is herein dismissed.

Dated, December 26th, 1944.

Michael J. Roche,
United States District Judge."

(Endorsed): Filed Dec. 26, 1944. (R. 24.)

It will be noted that the above order was "filed" but not "entered". Libelants, following the custom of the court, did not appeal from this order, but awaited the finding of facts and conclusions of law and a formal decree. On February 21, 1945, the findings of fact and conclusions of law and the formal decree were filed. The decree was also entered in Volume 35 of Judgments and Decrees, at page 368. The decree affirms the award of Deputy Commissioner Warren H. Pillsbury and orders the case dismissed. (R. 24-28.)

On April 24, 1945, an appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit. (R. 30-39.) Briefs followed, and the matter came on for hearing in the Circuit Court on February 6, 1946. On March 18, 1946, said Court ordered the matter dismissed because of alleged lack of jurisdiction. An opinion was filed. (R. 173-176.) In this opinion it is stated:

"The 'order' of December 26, 1944, was a final decision, within the meaning of Sec. 128(a) of the Judicial Code, 28 U.S.C.A. Sec. 225(a) and hence was appealable, but no appeal was taken therefrom. On February 21, 1945, the Judge signed and caused to be filed a 'decree' purporting to dismiss the amended libel which, in fact, was dismissed by the 'order' of December 26, 1944. From the 'decree' of February 21, 1945, this appeal was taken on April 24, 1945.

As heretofore stated, the 'order' of December 26, 1944, was a final decision. There was no other final decision in this case. No other final decision

was necessary. The 'decree' of February 21, 1945, was not a final decision and was not appealable."

"Appeal dismissed."

It is your petitioner's contention that the United States Circuit Court of Appeals for the Ninth Circuit erred (1) in declaring the order of December 26, 1944, a final order and appealable; (2) in declaring the decree of February 21, 1945, not a "final" order and not appealable; and (3) in dismissing the appeal. These facts constitute a summary statement of the matter involved.

STATEMENT OF BASIS OF JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 18, 1946. (R. 175.) A petition for rehearing was denied April 23, 1946. (R. 176.)

The three months period for filing this petition begins to run from April 23, 1946. Jurisdiction of this Court is invoked under the Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 938, as amended, Judicial Code, Sec. 240, U.S.C.A. Title 28, Sec. 347, also under the provisions of Rule 38, 5(b), Rule of the Supreme Court.

Jurisdiction was conferred on the District Court by Secs. 18 and 21(b) of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 33 U.S.C.A. 901 et seq., and the "Defense Bases Act" of August 16, 1941, 55 Stats. 622 (42 U.S.C.A., Secs. 1651 to 1654.)

QUESTIONS PRESENTED.

Whether the Circuit Court of Appeals erred:

1. In declaring the order of December 26, 1944, a final order and appealable;
 2. In declaring the decree of February 21, 1945, not a final order and hence not appealable;
 3. In dismissing the appeal.
-

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

1. Your petitioners, while following the mode of appeal, in use as long as their counsel can remember, and certainly since March 4, 1927, the date of passage of the Longshoremen's and Harbor Workers' Compensation Act, suddenly find their case dismissed. As they see the matter, this is through no fault of their own. To the contrary, had they appealed from the order of December 26, 1944, they would have expected to have their appeal dismissed as premature on the authority of *City and County of San Francisco v. McLaughlin*, 9 F. (2d) 407, and *Wright v. Gibson*, 128 F. (2d) 865, the latter saying:

"A judgment dismissing an action is a final decision and hence is appealable. An order which merely grants a motion to dismiss an action is not a final decision and is not appealable."

2. The Court in declaring the order of December 26, 1944, a final order and dismissing the cause because an appeal had not been taken therefrom deprived

libelants of findings of fact. The right to findings is given them by Rule 52(a) of the Rules of Civil Procedure, which says in part

"52(a). Effect. In all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment, and in granting or refusing interlocutory injunctions the Court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action * * *."

3. The order of December 26, 1944, is incomplete. Following are the differences between this order and the decree of February 21, 1945.

(a) The date of the trial is stated in the decree, but not in the order.

(b) The decree contains a statement of the character of the evidence used at the trial; the order does not.

(c) The amended libel is by the decree dismissed *without leave to amend*. The words in italics do not appear in the order.

(d) The words directing "that the amended compensation award of respondent Deputy Commissioner Warren H. Pillsbury, dated and filed on the 15th day of April, 1944, directing libelants above named to pay the claimant Walter L. Wood compensation as provided therein be and the same is hereby affirmed" do not appear in the order. They are, however, found in the decree.

(e) *That each party will pay its own costs.* The words printed in italics do not appear in the order.

(f) The approval of libelants' counsel as to form does not appear in the order as required by Rule 5(d), Rules of Practice of the District Court for the Northern District of California.

(g) The words: *Entered in Vol. 35, Judg. and Decrees at page 368* do not appear in the order, nor does the order contain any notation of entry indicating that it was spread in full on the pages of any book of the Court.

4. Because, where a case is tried and issues of fact determined, no abbreviated order, memorandum or notation of the Court is final as long as findings of fact and conclusions of law are yet to come.

5. Because this decision, if allowed to become the final determination of this case, will be a precedent establishing a lack of uniformity in the matter of terminating cases in the District Courts of the United States. Incidentally, wherever a case in the District Court is terminated by an order, the unsuccessful litigant will be deprived of the findings guaranteed him by Rule 52(a) of the Rules of Civil Procedure.

WHEREFORE, petitioners pray that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that

Court to certify and send to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of all proceedings in said case numbered on its docket No. 11,094, that the judgment of said Circuit Court be reversed, that petitioners have said case decided on its merits in said Circuit Court, and that petitioners have such other and further relief in the premises as to this Court may seem proper.

Dated, San Francisco, California,
May 27, 1946.

THEODORE HALE,
Counsel for Petitioners.

CARROLL B. CRAWFORD,
Of Counsel.

CERTIFICATE OF COUNSEL.

Theodore Hale, counsel and Carroll B. Crawford, of counsel, hereby certify that they are the attorneys for Liberty Mutual Insurance Company, a corporation, and Contractors Pacific Naval Air Bases, an association, the petitioners herein for a writ of certiorari; that in their judgment the above petition is well founded in point of law and that said petition is not interposed for delay.

Dated, San Francisco, California,

May 27, 1946.

THEODORE HALE,

Counsel for Petitioners.

CARROLL B. CRAWFORD,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals is reported in Fed. (2d), and appears in the record at page 173.

No opinion was rendered in the District Court.

The opinion of the Circuit Court of Appeals cites no authorities, merely saying that the "order" of December 26, 1944, "was a final decision, within the meaning of Sec. 128(a) of the Judicial Code, 28 U. S. C. A. Sec. 225(a), and hence was appealable but no appeal was taken therefrom".

Neither is any authority given for the Court's statement that the "decree" of February 21, 1945, was not a final decision and was not appealable.

II.

STATEMENT OF JURISDICTION.

A concise statement of the grounds on which the jurisdiction of this Court is invoked is given in the petition (p. 5), and, by reference thereto, is adopted here.

III.

CONCISE STATEMENT OF THE CASE.

A summary of the matter involved is given in the petition (p. 2). To avoid duplication, that statement is incorporated herein by reference as a concise statement of the case.

IV.

SPECIFICATION OF ERRORS.

The errors intended to be urged are those specified in the petition as the questions presented and numbered 1-3 (p. 6), all of which are specifically assigned as error.

V.

SUMMARY OF ARGUMENT.

1. The effect of the ruling of the Court in cases of this character, where issues of fact are tried by the Court, would be to deprive an unsuccessful litigant of findings of fact and conclusions of law, as provided by Rule 52(a) of the Rules of Civil Procedure.

2. The ruling of the Court is a violation of Rule 5(d), Rules of Practice of the District Court of the United States for the Northern District of California.

3. The Court erred in declaring the order of December 26, 1944, final and appealable inasmuch as it lacked certain indispensable requisites of a final judgment.

4. The ruling of the Circuit Court is unauthorized by statute and contrary to the decisions.

ARGUMENT.**I.**

THE EFFECT OF THE RULING OF THE COURT IN CASES OF THIS CHARACTER, WHERE ISSUES OF FACT ARE TRIED BY THE COURT, WOULD BE TO DEPRIVE AN UNSUCCESSFUL LITIGANT OF FINDINGS OF FACT AND CONCLUSIONS OF LAW, AS PROVIDED BY RULE 52(a) OF THE RULES OF CIVIL PROCEDURE.

Rule 52(a) of the Rules of Civil Procedure provides:

“52(a) Effect. In all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the Court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses. The findings of a master, to the extent that the Court adopts them, shall be considered as the findings of the Court.”

Cases upholding this rule are as follows:

“It is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52(a) of the Rules

of Civil Procedure, 28 U.S.C.A. following Section 723c."

Mayo v. Lakeland Highways Canning Company, 309 U. S. 310, 316, 60 S. Ct. 517, 520.

This was an action for a mandatory injunction.

"A discussion of portions of the evidence and the District Court's reasoning in its opinion do not constitute the special and formal findings by which it is the Court's duty appropriately and specifically to determine all issues presented and are not a compliance with equity rule requiring fact findings and conclusions of law to be stated. Equity Rule 70 $\frac{1}{2}$, 28 U.S.C.A., following Section 723c."

Interstate Circuit v. U. S., 304 U. S. 55, 58 S. Ct. 768, 82 L. Ed. 1146.

See also:

Kelley v. Everglades Drainage Dist., 319 U. S. 415, 420, 63 S. Ct. 1141, 1144. (Paragraph 7.)

"Where the issues cannot be decided satisfactorily on appeal without findings of fact by the trial court, the cause should be remanded in order that findings be made. *An opinion of the trial court is not sufficient*, where it does not present the findings or conclusions of the Court on relevant issues."

Woodruff v. Heiser, 150 F. (2d) 869. (C.C.A. 10.)

"Where the Court erroneously designated findings on matters of fact as conclusions of law, and

on other findings only as to what witnesses testified, and it was impossible to tell from the findings what the basis of the court's judgment was, the judgment was set aside and the cause remanded for a fuller compliance with Rule 52(a)."

Polaroid Corp. v. Markham, 151 F. (2d) 89.
(U.S.C.A., D. C.)

"Since the court in passing on a motion to dismiss for failure to prove a case is ruling on a question of fact, it must make findings of fact and conclusions of law.

As appears from the record, the latter rule was ignored and while none of the parties has raised the question, in order that the broad purposes of the rule may be achieved, we determine whether or not when a motion to dismiss is sustained under 41(b) at the conclusion of the plaintiff's evidence in a case tried by the court, findings of fact should be made.

The primary purpose of the Congress in authorizing the Supreme Court by rules to prescribe forms of process, writs, pleadings and motions and the practice and procedure in civil actions at law and to establish one form of civil actions and procedure in cases of equity and actions at law was to expedite and simplify the administration of justice. If the rules are to have vitality and accomplish their purpose, they must be followed."

Bach v. Friden Calculating Machine Co., Inc.
148 F. (2d) 407.

Young v. United States, 111 F. (2d) 823.

This was an action tried in the Ninth Circuit. The ruling in this case clearly shows the necessity for findings in cases tried without a jury where issues of law and fact are raised. Also this case represents the normal course of an action. The case was argued and submitted July 13, 1939. On August 2nd a minute order was entered ordering judgment in favor of defendants. On August 30, 1939, the court made findings of fact and entered judgment. The appeal was taken from the judgment of August 30th.

If the ruling in the instant case was correct and the order of December 26, 1944, final and appealable, why was not the same thing true in the *Young* case?

Lee v. Walworth Co., 1 F. R. D. 569.

(The colloquy reported below took place in the District Court for the Southern District of New York on December 11, 1940.)

In this case the defendant's motion for a decree dismissing the bill of complaint was granted. Mr. Clune, attorney for plaintiff, addressing Mr. Land, attorney for defendant, said:

"Would you stipulate to waive?

The Court. I will answer that, you may not waive findings of fact. Any doubt about that would be very definitely eliminated by the Supreme Court decisions in the last year or two. The farthest we may go is to say that it is not necessary to have findings of fact and conclusions of law unless an appeal is not taken. If an appeal is taken, there should be findings of fact and conclusions of law.

Mr. Clune. Then the time to file findings of fact and conclusions, which will be done by the defendant I suppose—I just wanted to limit the time.

The Court. The reason why I state that findings of fact and conclusions of law should be presented promptly is that I wanted them in while the facts are still fresh in my own mind.

Mr. Clune. The defendant would have to do it, anyway.

Mr. Land. Both sides usually.

The Court. If you take an appeal, I suppose the other side would make the findings of fact and conclusions of law, but I think you might be interested in those findings of fact and conclusions of law yourself.”

II.

THE RULING OF THE COURT IS A VIOLATION OF RULE 5(d), RULES OF PRACTICE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

The decision of the Circuit Court deprives the losing party of findings of fact and conclusions of law in any case involving an issue of fact. It is therefore contrary to Rule 5(d), Rules of the District Court for the Northern District of California, and to other privileges accorded him by such rule. Rule 5(d) follows:

“5(d) *Settlement of Orders and Judgments by the Court.* Within five days of the decision of the Court giving any order which requires settlement

and approval as to form, the prevailing party shall prepare a draft of the order or judgment embodying the Court's decision and present it for approval to each party who has appeared in the action. Each party shall examine it at once, and if he approves, endorse with the words, 'Approved as to form, as provided in Rule 5(d),' and append his signature thereto. Such endorsement shall not affect the rights of any party, but shall be considered only as an indication to the Judge that the form is correct. If any party does not approve, he shall endorse with the words, 'Not approved as to form, as provided in Rule 5(d),' specifying his reasons. The party proposing the order or judgment shall thereupon serve a copy upon each other party, and lodge the original and one copy with the Clerk. Each party who disapproves the order or judgment shall have five days within which to serve and lodge with the Clerk proposed modifications thereof. If all parties approve, or if no modifications are presented within said five days, the order or judgment if approved by the Judge, shall be signed and filed by him. If any proposed modifications of the order or judgment are presented as herein provided, the Judge shall order such modifications made as he deems proper. If the attorney for the prevailing party fails to observe the above provisions, any attorney in the case may submit to the Judge a draft of the proposed order or judgment.

(e) *Findings of Fact and Conclusions of Law.* Within five days after receipt of written notice of an opinion or memorandum order for judgment, the prevailing party shall prepare a draft

of the findings of fact and conclusions of law and lodge them with the Clerk, serving a copy upon the adverse party, who may within five days thereafter file with the Clerk and serve upon the prevailing party his proposed amendments. If the adverse party proposes no amendments he may endorse his approval on the original draft, which may then be presented immediately to the Judge for his signature.

If the prevailing party fails to lodge and serve his draft within five days the adverse party may proceed within five days thereafter as herein provided.

The findings of fact and conclusions of law shall thereafter be settled by the Judge, and when so settled shall be signed by him and filed."

III.

THE COURT ERRED IN DECLARING THE ORDER OF DECEMBER 26, 1944, FINAL AND APPEALABLE INASMUCH AS IT LACKED CERTAIN INDISPENSABLE REQUISITES OF A FINAL JUDGMENT.

The order of December 26, 1944, lacked certain indispensable requisites of a final judgment.

"Order," "judgment" and "decree" are not synonymous. "Judgment" and "decree" are fixed terms. Except as modified by other words, such, for instance, as "interlocutory", their meaning is always the same. An "order" may be anything from the continuance of a trial date to an order dismissing a cause for lack of prosecution. Such orders as the one last named are

usually final and appealable orders. However, careful practitioners usually have them followed by a "judgment of dismissal".

Occasionally one finds a judgment captioned an "order", as in *Sosa v. Royal Bank of Canada*, 134 F. (2d) 955, where appears what is captioned an "Order Sustaining Motion to Dismiss". It dismissed the complaint, awarded costs and directed the issuance of an execution. It was therefore in fact a judgment, though captioned an order. Its last paragraph begins "It is, therefore, ordered, adjudged and decreed", etc.

In the instant case, irrespective of appellant's right to findings of fact and conclusions of law, followed by a decree, the order was incomplete for the following reasons:

1. The date of the trial is stated in the decree, but not in the minute order.

2. The decree contains a statement of the character of the evidence used at the trial or hearing; the minute order does not.

3. That the amended libel is by the decree dismissed *without leave to amend*. The words in italic do not appear in the minute order.

4. The following words do not appear in the minute order: *That the amended compensation award of respondent Deputy Commissioner Warren H. Pillsbury dated and filed on the 15th day of April, 1944, directing libelants above named to pay the claimant, Walter L. Wood, compensation as provided therein be and the same is hereby affirmed.*

5. *That each party will pay its own costs.* The words in italic do not appear in the minute order.

6. The approval of libelants' counsel as to form does not appear in the minute order as required by Rule 5(d), Rules of Practice of the District Court.

7. The words: *Entered in Vol. 35, Judg. and Decrees at Page 368* do not appear in the minute order.

8. The minute order deprives the losing party of findings if considered final and appealable; the decree (preceded by findings) enables him to present a complete case.

IV.

THE RULING OF THE CIRCUIT COURT IS UNAUTHORIZED BY STATUTE AND CONTRARY TO THE DECISIONS.

It will be noted that the only authority cited by the Circuit Court is Section 128(a) of the Judicial Code, 28 U. S. C. A. Section 225(a). So much of this section as is applicable reads:

“225. (Judicial Code, Section 128, amended.)
Appellate Jurisdiction—

(a) Review of final decisions. The Circuit Courts of Appeals shall have appellate jurisdictions to review by appeal or writ of error final decisions:

First. In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title. * * *

The above is, of course, not an authority for deciding what is and what is not a final judgment. Nor have your petitioners been able to find any case sustaining the ruling of the Circuit Court.

Monarch Brewing Co. v. George J. Meyer Mfg. Co., 9 Cir., 130 F. (2d) 582, 583, is a leading authority to the contrary:

"Before proceeding to a discussion of the allegations of the complaint upon which the Court granted the defendant summary judgment, we are faced with a question raised by the defendant as to whether or not the appeal herein was timely. It appears that on October 8, 1941, the District Court made its order reading in part as follows:

'The motion of the Defendant for summary judgment in its favor * * * heretofore argued and submitted, is now decided as follows:

'The said motion is hereby granted upon the ground * * *.'

The order was entered on the docket of the District Court on the same day. On October 13, 1941, the following judgment was entered:

'"The defendant * * * having filed herein on the 9th day of August, 1941, its written motion for summary judgment in its favor * * * and said motion having come on regularly for hearing before the above entitled court * * * on the 29th day of September, 1941, and the Court, after hearing the arguments of counsel, having taken the matter under submission, and, thereafter, being fully advised in the premises, having filed herein its memorandum decision, dated the 8th day of October, 1941, granting said motion:

“It is therefore ordered, adjudged and decreed that the plaintiff take nothing by its action against the defendant, and that the defendant have and recover from the plaintiff defendant’s costs herein * * *.” Notice of appeal herein was filed on January 13, 1942, exactly three months after the entry of the last mentioned document, but more than three months after the entry of the order first referred to. The question as to whether or not this appeal is timely, then, depends on whether the first order was a final decision of the District Court. Sec. 128 Judicial Code, 28 U.S.C.A. Sec. 225: 28 U. S. C. A. Sec. 230.

We are of the opinion and hold that the appeal was properly taken. We are satisfied that the order of October 8th was not intended as the rendition of a judgment in favor of the defendant. Instead the trial judge announced that he granted the defendant’s motion. This motion was that a judgment be entered in its favor. The subsequent order of October 13th refers to the October 8th order as a ‘memorandum decision’ granting the defendant’s motion, and was unquestionably intended by the trial court as the final decision in the case. The situation would seem analogous to one where the trial court grants a motion to dismiss, in which case *this court has held that no appeal may be taken from the order granting the motion, but that it must be taken from the judgment of dismissal.* See *City and County of San Francisco v. McLaughlin*, 9 Cir., 9 F. (2d) 390; *Wright v. Gibson*, 9 Cir., June 15, 1942, 128 F. (2d) 865.” (Italics ours.)

Monarch Brewing Co. v. George J. Meyer Mfg. Co., 9 Cir., 130 F. (2d) 582, 583.

"The first question which arises is whether the order was appealable. If it was not, this court has no jurisdiction. It is the duty of the court to determine this jurisdictional question. *City and County of San Francisco v. McLaughlin* (C.C.A. 9) 9 F. (2d) 390; *Highway Const. Co. v. McClelland*, 14 Fed. (2d) 406 (C.C.A. 8); *Equitable Life Assur. Soc. v. Rayl*, 16 F. (2d) 68 (C.C.A. 8). It is well settled that an order sustaining a demurrer to a complaint, or granting a motion to dismiss a complaint, *without entry of judgment*, is not a final order within the meaning of Section 128 Judicial Code (28 U.S.C.A. 225)."

Dyar v. McCandless (C.C.A. 8), 33 F. (2d) 578, 579.

"A writ of error operates only on a record in which a final judgment has been entered."

Morris v. Dunbar (C.C.A. 3), 149 F. 406.

"It is well settled that an order sustaining a demurrer to a petition is not a final order within the meaning of 28 U.S.C.A., Sec. 225 (citing cases). The proper procedure is for the plaintiffs to elect to stand upon their petition and to let a final judgment of dismissal be entered against them. An appeal will then lie from such final order and the ruling on the demurrer may be reviewed."

Dye v. Farm Mortgage Inv. Co. (C.C.A. 10), 70 Fed. (2d) 514.

In *Rardin v. Messick*, 78 F. (2d) 643, an appeal from the opinion of the Court and not from its final

decree (made *nunc pro tunc* after three months) was dismissed.

CONCLUSION.

In conclusion your petitioners respectfully submit that a writ of certiorari should be granted.

1. Because there is no law, either statute or of the decisions, authorizing the decision of the Circuit Court.

2. Because the ruling of the Court deprived your petitioner of the privilege of having findings of fact, contrary to Rule 52(a), Rules of Civil Procedure.

3. Because, where a case is tried and issues of fact determined, no abbreviated order of the Court is a "final order" as long as findings of fact and conclusions of law are yet to come. (*Monarch Brewing Co. v. George J. Meyer Mfg. Co.*, 9 Cir., 130 F. (2d) 582, *supra*.)

4. That the order was not submitted to your petitioners for approval as to form, as required by Rule 5(d), Rules of the District Court.

5. That the order of December 26, 1944, is incomplete as heretofore shown.

6. That the order of December 26, 1944, was not regarded by the District Judge who signed it as a final order or judgment in the case. Otherwise he would not subsequently have signed findings and a decree.

Wherefore, petitioners respectfully urge that a writ of certiorari be issued as prayed.

Dated, San Francisco, California,
May 27, 1946.

Respectfully submitted,
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Counsel for Petitioners.

CARROLL B. CRAWFORD,
Of Counsel.